REDACTED VERSION

PLANETSPACE, INC.,)
Plaintiff,)
)
v.) Docket No.: 09-99C
UNITED STATES,)
Defendant.)

Courtroom 9, Room 310
National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Friday,
February 20, 2009

The parties met, pursuant to notice of the Court, at 10:06 a.m.

BEFORE: HONORABLE ROBERT H. HODGES, JR.
Judge

APPEARANCES:

For the Plaintiff: (Via Telephone)
ROBERT S. METZGER, Esquire
Pillsbury Winthrop Shaw Pittman, LLP
725 South Figueroa Street, Suite 2800
Los Angeles, California 90017
(213) 488-7437

Also For the Plaintiff:
JACK Y. CHU, Esquire
Pillsbury Winthrop Shaw Pittman, LLP
1650 Tysons Boulevard, 14th Floor
McLean, Virginia 22102-4859
(703) 770-7674

APPEARANCES: (Cont'd)

For the Defendant

WILLIAM P. RAYEL, Esquire
STEVEN M. MAGER, Esquire
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
1100 L Street, N.W., Room 12100
Washington, D.C. 20530
(202) 616-0302 / 616-2377

For the Agency:

VINCENT A. SALGADO, Esquire
National Aeronautics and Space Administration
Office of the General Counsel
300 E Street, S.W.
Washington, D.C. 20546
(202) 358-2050

For the Intervenor, Orbital Sciences Corp.:

AMY L. TENNEY, Esquire
KEVIN C. DWYER, Esquire
Jenner & Block, LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001
(202) 639-6000

For the Intervenor, SpaceX:

RICHARD J. VACURA, Esquire
KERIC CHIN, Esquire
Morrison & Foerster, LLP
1650 Tysons Boulevard, Suite 400
McLean, Virginia 22102
(703) 760-7764

Also For the Intervenor, SpaceX:

ROBERT A. SALERNO, Esquire
Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888
(202) 887-6930

P R O C E E D I N G S

(10:06 a.m.)

THE CLERK: All rise. The United States Court of Federal Claims is now in session, the Honorable Robert H. Hodges presiding.

THE COURT: Good morning. Be seated, please. Thank you. All right. Good morning everyone. We're on the record. Mr. Metzger, would you introduce yourself and your colleague? Oh, Mr. Metzger is on the phone. I'm sorry, you're Mr. Chu. Is that right?

MR. CHU: I am Jack Chu from our office in Northern Virginia, Your Honor. I am calling in from California. We are with the firm of Pillsbury Winthrop, and we are representing Planetspace, the Plaintiff Petitioner in this action.

THE COURT: All right, thank you and welcome. And the Defendant, the United States, Mr. Rayel, is that correct?

MR. RAYEL: Yes, Your Honor, I'm William Rayel for the United States. With me is Steven Mager, also from the Department of Justice, and Vincent Salgado from NASA.

THE COURT: Well, welcome to you all. Thank you. I can tell Mr. Churchill is not here. Ms.

Tenney?

MS. TENNEY: Yes, good morning, Your Honor. I'm Amy Tenney from Jenner & Block. Mr. Churchill is out of the country and wasn't able to make it back in time for the hearing today. He extends his apologies.

THE COURT: Well, no problem. Give him my regards. And Mr. Vacura, is that correct?

MR. VACURA: Yes, Your Honor, Richard Vacura with Morrison & Foerster for SpaceX, or Space Exploration Technologies Corporation, commonly called SpaceX. With me in the Court today are Robert Salerno and Keric Chin, who are also with Morrison & Foerster.

THE COURT: All right. Well, thank you very much. I appreciate your being here on short notice. I don't know how important it is, the timing on this case, but it sounded as though perhaps it would be helpful for me to go ahead and rule on the issue.

I don't have a record of any sort, of course. I don't know whether anyone else does. But the cases in this general area speak in terms of searching the inquiries under APA. Obviously, we can't have one of those.

My only view, in any event, is that the APA standards we apply probably in this case are closer to what the Supreme Court says we are not supposed to do,

which is to review the record with a glancing inquiry into the facial reasonableness of the agency's stated rationale.

That particular case, I admit I'm not familiar with the facts. But I assume it was a substantive agency decision or ruling, as most of the APA cases are. I'm happy to be convinced to the contrary. But my impression is that our duty here on a case like this of considering the override, it is in fact more of a glancing inquiry into the facial reasonableness of the agency's stated rationale.

Again, I'm happy to be convinced otherwise. But what strikes me particularly if it's important that we rule promptly. It seems that that would be my general feeling going into it. I've probably had cases like this in the past. I don't recall one exactly like this, frankly. But this is the way it strikes me on first review. But as I say, I'll let you folks convince me to the contrary if you like.

Who has the burden here? Would the Plaintiffs like to begin, Mr. Metzger?

MR. METZGER: Yes, thank you, Your Honor; we do have the burden.

THE COURT: Go right ahead.

MR. METZGER: I'm pleased to attempt to

carry it. I think it's important to set the context of the present proceeding.

The immediate question before the Court, as I see it at least, is whether to grant temporary relief in the form of a temporary restraining order, so that the agency cannot permit performance of these two controverted contracts until the Court has had time to consider the agency record; receive the pleadings and comments of the interested parties; accept argument after that preparation, and then oral on the merits of the preliminary injunction which we seek.

The situation, in a nutshell, is that on December 23rd, NASA announced a decision selecting two companies, each of which are represented in Court today, SpaceX and Orbital Sciences, to receive awards to provide re-supplied services to the International Space Station some years hence. My client, Planetspace, filed a final protest with the GAO on January 14th.

Twenty-six days later, NASA advised that it had made a determination in finding to override the stay of performance of the contested contracts; but notwithstanding the mandate of the Competition in Contracting Act that the stay remain in place until

the GAO has sufficient time to consider the merits of the protest, issue a decision, and recommend corrective action, if any.

The GAO was notified of NASA's override on February 10th; and on 18th, Planetspace filed the present action in this Court.

What Planetspace seeks is not a decision on the merits of its protest or the merits of the underlying procurement action. Those are before the GAO.

What Planetspace does seek is a confirmation by this Court that the GAO will have the time that it needs to make a decision, and will not be limited or constrained in that decision by expedience and ill considered actions as the agency may take in the interim to provide funding on contracts where one or both may be set aside as a consequence of the GAO's pursuit.

Our filing, as I mentioned, was made on Wednesday. It is accompanied by a memorandum appointing authorities. We believe that we made a showing that temporary relief was appropriate, in light of the standards that are applied by the rules of the Court, as well as the cases of this Court.

We also have shown a number of aspects by

which Plaintiff's base would suffer irreparable harm if temporary relief were not granted. We come to the Court today asking that the Court issue that relief -- not to make a final decision upon the wisdom of the rationale that NASA has articulated that supported the override; but rather, Your Honor, to be sure that on this important procurement, that the Court has the time to review the agency record, to consider carefully the serious questions that we have raised in our pleadings.

We hope that the Court will, within a period of 10 days to two weeks, put all of the parties to the task of, in our case, sustaining our challenge to the override action; and in their case, attempting to defend it.

I would draw the Court's attention -- although I'm sure it isn't necessary -- to the rules of the Court of Federal Claims at Appendix C, Rule 515(a), in which it is required that the parties consider whether and to what extent, absent the temporary relief, the Court's ability to afford effective final relief is likely to be prejudiced. Our view on that point is straight forward.

The NASA determination, which we received just a few days ago, indicates that the agency has

current intentions of funding SpaceX and Orbital Sciences of $10 million each. That may not be the limit of what the agency spends on the contested procurement. But it is a significant amount of money, especially when there was a stay in place for a month, and there is a protest pending today.

Our concern is that the agency, through this belated override termination, in fact, is trying to accomplish exactly that which Congress sought to avoid when, in 1984, in enacting the Competition in Contracting Act, it emphasized the importance of the stay on procurement as part of the bid protest mechanism.

The lifting of a stay, Your Honor, is not an action that should be taken lightly by any agency; and certainly is not one to be countenanced by a reviewing Court, this Court, without a great deal of care.

There have been a number of override decisions rendered by the Court of Federal Claims, as the Court, of course, is well aware; and over the past several years, a body of laws emerged, which many judges in this Court have considered in looking at override decisions.

Obviously, the question is whether the override stance is ultimately determined under the

Administrative Procedure Act, as the Court recognized. The question there, of course, is whether the Act is arbitrary and capricious, an abuse of discretion, or otherwise is not in accordance of law.

Beyond the general APA case law, however, there are a series of decisions over the past several years in the Court of Federal Claims, which add considerable refinement to how the basic APA standard is applied.

With respect, Your Honor, those cases indicate that the override decision, because it comes against a specific Congressional mandate, ordinarily by this Court is viewed with certainly respect for the agency's rationale; but with a degree of skepticism that would be different than the standard that you referenced of a glancing inquiry.

In fact, several years ago, in 2006, there was a case, Reilly's Wholesale Produce, which we mention in our filing, which attempted to articulate four standards which are to be applied in the determination of whether this kind of action, an override of the CICA stay, is to be sustained or overruled under the APA standard.

The four standards are first, whether there is a significant adverse consequence that will

necessarily occur if the stay is not overridden.

The second standard is whether reasonable alternatives to the override exist that would adequately address the circumstances presented.

The third standard is how the potential cost of proceeding with the override is, including the costs associated with the potential that the GAO might sustain the protest, compared to the benefits of the approach that is being considered to address the agency's needs.

The last standard, Your Honor, is the impact of the override on competition and the integrity of the procurement system.

Since the Reilly's Wholesale Produce decision in 2006, there have been several further decisions in this Court which have followed that guidance; and more decisions than not which have followed Reilly's Wholesale Produce, in fact, that have overturned an override and, therefore reinstated the stay that ordinarily is mandated by the Competition in Contracting Act.

In our complaint, Your Honor, as well as in the memorandum of points and authorities that we offered into Court, we went to considerable lengths to show that in this case that the override determination

of NASA did not satisfy any of the four factors that were articulated in Reilly's Wholesale Produce.

That is noteworthy, Your Honor, because one can fairly read the case law to indicate that the failure of an agency to adequately consider even one of those four factors is fatal to its ability to sustain an override.

We argued that all four were unsatisfied. We looked very carefully at the determination, and we sought not only to criticize it as a matter of rhetoric or advocacy -- and this is important -- but to show that from the record of NASA's own conduct and from statements made by NASA officials in testimony made before Congress, that many of the things that are said in the override determination are, in fact, rebutted by the actions, conduct, and statements of the agency that now says them.

For that reason, Your Honor, alone, I think it's very, very important to put NASA through the obligation to provide a record that will support the many sweeping, dramatic statements that are included in its override determination.

As I'm sure the Court recognizes, the promise of the override determination is that the International Space Station will not be supported; and

that the United States will fail to perform obligations that it has to its international partners, if the stay is not lifted and if two companies are permitted to begin their performance 74 days earlier than would have occurred if the GAO were permitted to have all of the time it is allowed.

They also make some very dramatic statements about the consequences to the ISS. It makes very dramatic statements about its inability to support the station, other than through an accelerated performance of these newly awarded contracts.

What we have shown in our papers, however, is that these statements are largely speculative, often exaggerated; that they are strained and over-wrought, and that they are repeatedly contradicted by facts and by NASA's own actions.

If it turns out that NASA has something behind these dramatic statements, then they ought to be able to provide that in the agency record. I would submit, Your Honor, that the Court has a very strong interest in wanting to see that record and see whether NASA can back up what it says.

If we were to allow NASA the benefit of the override based only upon the determination that's expressed through this override memorandum, we would

essentially be licensing an agency to say anything, to have few limits in the bounds of its imagination, and we would not hold them to the fundamental obligation as it's been recognized by this Court that an agency's override decision not only has to consider relevant factors, but it also has to make findings in an override determination that are consistent with and not counter to the evidence before the agency.

And in this regard, Your Honor, I refer you to the decision of the Court of Federal Claims in the case of Nortel Government Solutions, which was decided in 2008, again relying upon Reilly's Wholesale Produce. We have shown specific and multiple examples of where NASA's override memorandum doesn't square to the facts, and I think it is appropriate to ask NASA to give us a record that supports what they claim.

Now turning to the individual elements under the Reilly's Wholesale case --

THE COURT: Excuse me, Mr. Metzger. If you don't mind, the Reilly standards, where did those come from? Is that sort of a compendium of cases in this Court, those standards? Normally, we don't make standards here.

MR. METZGER: Yes, Your Honor; I think that is a fair characterization. The Court in that case

looked at the history of override decisions; and sought to find a way to extract and identify the key factors in the prior decisions of this Court, which had been employed in applying the APA review standard to the particular question of whether a CECA override was reasonable or not.

So Reilly's Wholesale Produce essentially sought to give instructions to the Government and, therefore, guidance in the form of precedent as to what the Government would be expected to demonstrate.

Since that case was decided in 2006, it is my belief, Your Honor, based upon my review of the subsequent cases, that each of the later decisions of this Court on override decision have elected to follow that method of analysis and have made their determination based upon the satisfaction or not of those four factors.

THE COURT: The statute, by contrast, merely says essentially -- and I don't have the exact language here -- that the agency makes a written finding, and I assume that's some person in the agency, a responsible person, that it's in the best interests of the United States; and that urgent and compelling circumstances require an override. That's all the statute says.

Normally, in a circumstance like that, it seems to me where we have a non-substantive review, in a sense, we are looking for arbitrary and capricious actions by the agency. It may be that's too simple. But it seems to me that that's what we're accustomed to doing in this Court.

The Really standards, given time, would be, I'm sure, very important in trying to determine whether the decision was arbitrary and capricious. But I don't I know how much time we have. If it takes a couple of to resolve this; then the issue becomes moot, in a sense.

MR. METZGER: Well, Your Honor, I certainly appreciate the terms of the statute. But I understand that the Court is looking to act in a fashion that is both expedient and proper.

At the same time, you have to recognize that the purpose of the TRO that we seek is to maintain the statute quo, so that the Court will have the time -- and it is only a few weeks -- to consider the agency record, and to allow the parties to brief the agency record; and so that the Court can be fully familiar not only with the positions of the interested parties -- but also with the body of case law that's been decided in this Court, as well as with the specifics

of the rationale that has been articulated by the agency.

I have, Your Honor, had the occasion to do a significant amount of work and review of cases decided under the ACA; and I appreciate -- and I'm sure the Court does, as well -- that, in fact, there is no single standard or approach through to a decision.

But there are questions as to the extent, the deference and the nature of the stay, and the factors that the Court questions as to the nature of the deference, the extent of deference, the nature of review, and the particular factors that are to be considered by a Court in different context as to the application of the APA standard.

As I'm sure the Court recognizes, if the only question illustration was whether performance of the contract is in the best interest of the United States, then there would be no subsequent case law of any consequence; because the United States could carefully infer that it wants the contract to be performed, and it asserts that to do so is in its best interests; then no outside party could have a serious likelihood of correcting the United States from that impression, if it's mere assertion were sufficient.

But the case law has not evolved that way.

In fact, in this area, you have to recall that Congress made it absolutely clear in 1984 that it expected that a stay would be imposed on procurement during the pendency of a GAO protest; and that it was only in the rare exception, only where an agency could demonstrate urgent and compelling circumstances that the stay should be lifted.

The cases that have followed have consistently taken a careful approach to the determination of whether the Government, in fact, has proven urgent and compelling circumstances.

I very much appreciate, Your Honor, that there are situations where the actions of the Government are entitled to a high standard of deference. I will acknowledge that in cases before your Court, some involving national security issues, I have argued that certain types of actions or acts by certain people do warrant a higher measure of deference.

But the body of case law here, of which Reilly's Wholesale Produce is just one example, is consistent with being more demanding of the Government than would be the outcome if only they would take a glance and look at the rationale. That would make it too easy. The agencies too often override what

Congress very clearly expected as the norm.

And in the circumstances present here, I don't think it is the appropriate answer as a matter of policy, as a matter of application of procurement law, out of respect for the Office of Competition.

Also, again with respect, Your Honor, I think that it would behoove the Court to take the time that it needs, just a week or two, to make a determination on a preliminary injunction; so that the Court had the time to consider more fully the Reilly's Wholesale case, the Nortel case, and the other decisions that are consistent in establishing what is now the prevailing standard of review of override determination.

THE COURT: Let me take this opportunity to maybe get out of trouble with my clerk here, who reminds me I was perhaps being a little bit facetious at the very beginning when I suggested that the standard is a glancing blow or whatever it was to make a point, I guess. I don't mean to suggest that that's the standard I'm employing here. So maybe that will get me out of trouble.

But Mr. Metzger, you mentioned the interim and the risk of things happening in the interim. You mentioned funding, for example. What else might

happen in the interim that cannot be undone, if necessary?

MR. METZGER: I'd like to divide my answer, Your Honor, into two parts. The first part will not make reference to any proprietary or competition sensitive information. The second part would make reference to that information.

So when I come to the second part, may I ask that the Court request individuals who are not admitted under the protective order to leave the Court, as there may be some in the courtroom?

THE COURT: The issue of the protective order --

MR. METZGER: Well, what I will do, Your Honor --

THE COURT: -- certainly just let me know when we get to that point, and we'll deal with that on this end.

MR. METZGER: What NASA has said it intends to do is to permit these two companies to perform the CRS contracts, which are intended to enable them to perform re-supply missions to the Space Station some years hence.

NASA has said that it has currently funded these two companies, each in the amount of $10

million. NASA has also given at least its impressions of what the companies are going to do with this money. They say that they'll engage in detailed mission integration planning, and capital equipment and long lead item purchases.

You talk about orders for cargo modules and propellants and compression tanks and subsystem components. What I believe NASA intends to do, Your Honor, is get the GAO into a small box where no matter what the GAO decides about the merits of the Planetspace protest, it won't feel it has any choice other than to limit its correction action. Because it may recommend something other than displacing, Your Honor, both of these companies.

When NASA says that it has current funding of $10 million each, it does not, Your Honor, say that that's the limit of the funding that it will make available if the stay is lifted. We have no idea what that limit is.

NASA made much more than $20 million; and we have to consider what they hope to have it spent for. That's entering into contracts where things are going to be billed, in some cases, overseas. That will certainly make it hard for the GAO to decide why not to let that company have the contract.

The hazard here is that a great deal of money is going to be spent; and that the practical opportunity to offer any relief to the protest will have been foreclosed because of what some people would call the performance equity that will be gained.

In this case, it's not equity. Simply put, our protest asserts that NASA made various errors in the procurement and that, Your Honor, both of these companies are not entitled to the contracts which NASA wishes that they now performed.

If we're right, and if just one of these companies is displaced, then the consequence, Your Honor, is that all of those items that the companies may purchase will have to be canceled. There will be disputes. The money that NASA spends will be lost, and it will be wasted; and that makes no sense.

It makes no sense in this particular case because, Your Honor, NASA's recommendation as to one of the companies before you, that they received the award even though the NASA evaluation team at the Johnson Space Flight Center ranked the proposal of Planetspace higher in its mission suitability; and the price that my client proposed was half a billion dollars or more, less.

So if we let the override remain in place,

NASA is going to pour money into the performance of one company that we assert doesn't deserve to have the contract and shouldn't; and that seems, to me, to be a waste.

Moreover, NASA would have us believe that accelerating the performance of these two companies by lifting the stay is actually going to make a difference in the ability of either to support the Space Station.

That's a fairly incredible statement, when one considers that neither of these companies have actually flown the last vehicle that they would have to use, years later. None have actually flown the orbital vehicle that would rendezvous with the Space Station.

The first launch that SpaceX hopes to make in December of 2010 under this contract was 22 months away. The first launch that Orbital hopes to make is 30 months away. To a schedule, Your Honor, these companies will have to have years of successful efforts where not anything goes wrong with any of the very challenging activities that are before them.

As we've said in our papers, Your Honor, the history of development of space systems does not warrant that confidence; nor does the actual

experience of either Orbital and SpaceX and the contracts they already have

THE COURT: Well, let's see, those are merit sorts of arguments, it seems to me, or it sounds like it. Other than, as a taxpayer and my being annoyed by that waste of money, does it prejudice Plaintiff in any way?

MR. METZGER: Well, that's a very good question. If I may ask at this point if we could ask persons who are not counsel, who are admitted under the GAO protective order that would be admissible under this Court's protective order, to leave, I will address that.

THE COURT: All right, you folks know who you are that are not admitted. This is my intern here behind the Plaintiff's bench. If no one has an objection, I would --

MR. MAGER: Your Honor?

THE COURT: Yes.

MR. MAGER: I believe all of the individuals here are either attorneys; or in one case, from the agency, from NASA. However, I am not certain. I do not believe this Court has ruled with regards to the admission of the various Intervenors under this Court's protective order.

So it may be useful to first discuss the admission of the Intervenors under the Court's protective order. Then in that case, I believe everyone in the courtroom will be covered by the protective order.

THE COURT: Have we admitted the Intervenors? We haven't done that either. Well, is there any objection to that? Is there any objection to the Intervenors, Mr. Metzger?

MR. METZGER: No, I have no objection, Your Honor. I did receive a communication early this morning from counsel for SpaceX, Mr. Vacura, who said that he thought that an in-house attorney for SpaceX might be present.

I don't know whether that individual is present. But because of that possibility, I do feel I should raise the question.

THE COURT: All right, well, for the record, we'll admit the Intervenors who are represented here, whose names escape me for the moment. But we'll issue an order confirming that; and is there any objection to their admission, to the protective order?

MR. METZGER: No, Your Honor.

THE COURT: And past counsel is the only issue; is that right?

MR. METZGER: Or any other business person who might have a problem with Orbital Sciences or SpaceX.

MR. VACURA: Your Honor?

THE COURT: Mr. Vacura?

MR. VACURA: The in-house counsel for SpaceX decided not to attend.

THE COURT: Okay.

MR. VACURA: So he's not present in the courtroom.

THE COURT: All right, so from what we can determine here, the representation, at least, is that everyone was clear; yes, ma'am?

MS. TENNEY: One other item, Ms. Baldwin is the courtroom. She is a law clerk in our firm. She's not yet admitted to the Bar, so she's not admitted under a protective order. But she works at the law firm.

THE COURT: All right, do you have any problem with that, Mr. Metzger?

MR. METZGER: No.

THE COURT: Okay.

THE COURT: Nor do I; yes sir?

MR. RAYEL: Just to clarify, I believe I read the protective order as the standard one issued

by the Court.

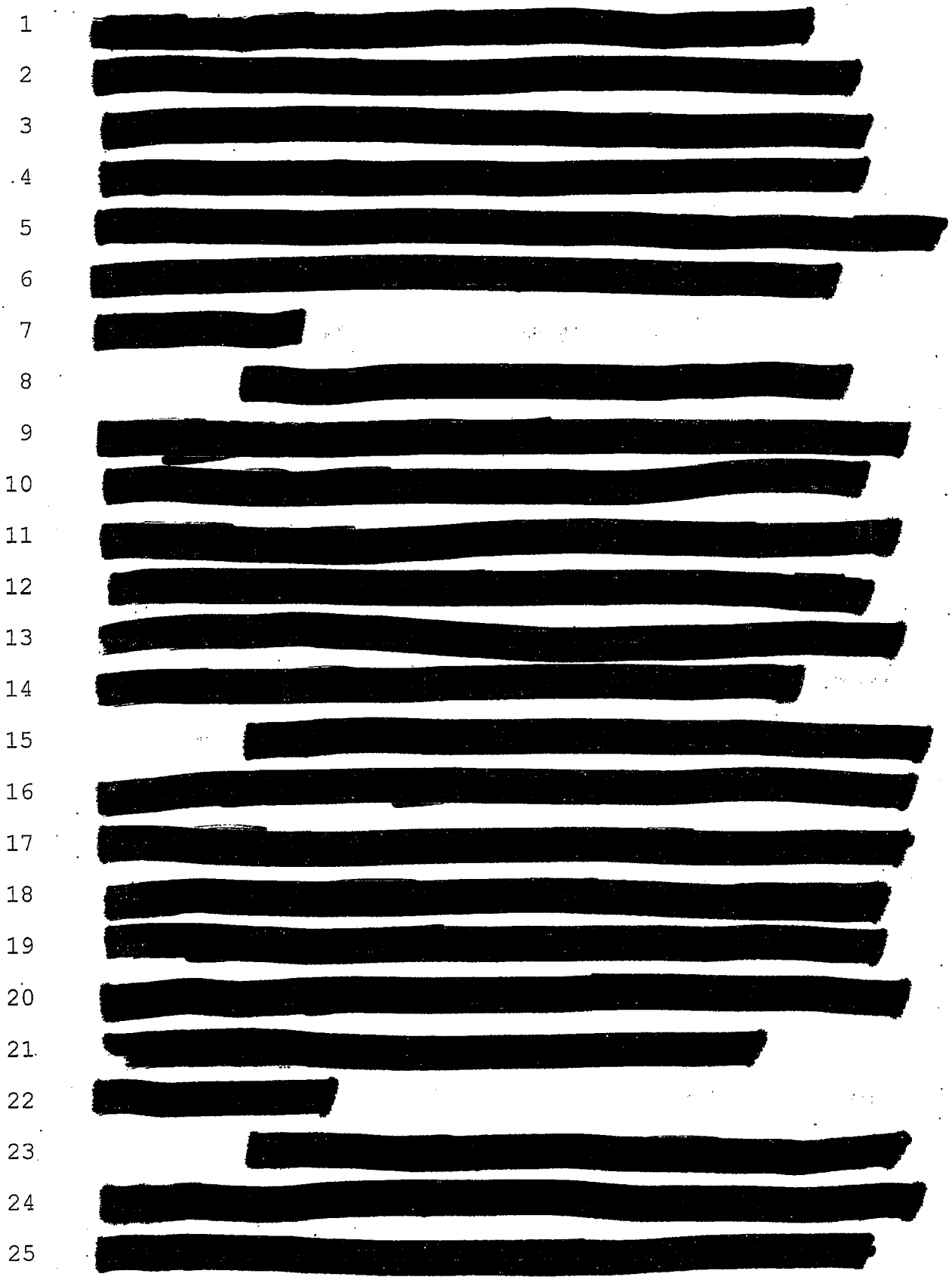
So technically, none of the attorneys here, except for the Government people -- all the Government people in the Court are actually admitted under the protective order. So the Court would have to make both Plaintiff's counsel and Intervenor counsel. We don't have an objection to that. I'd just note it for the record.

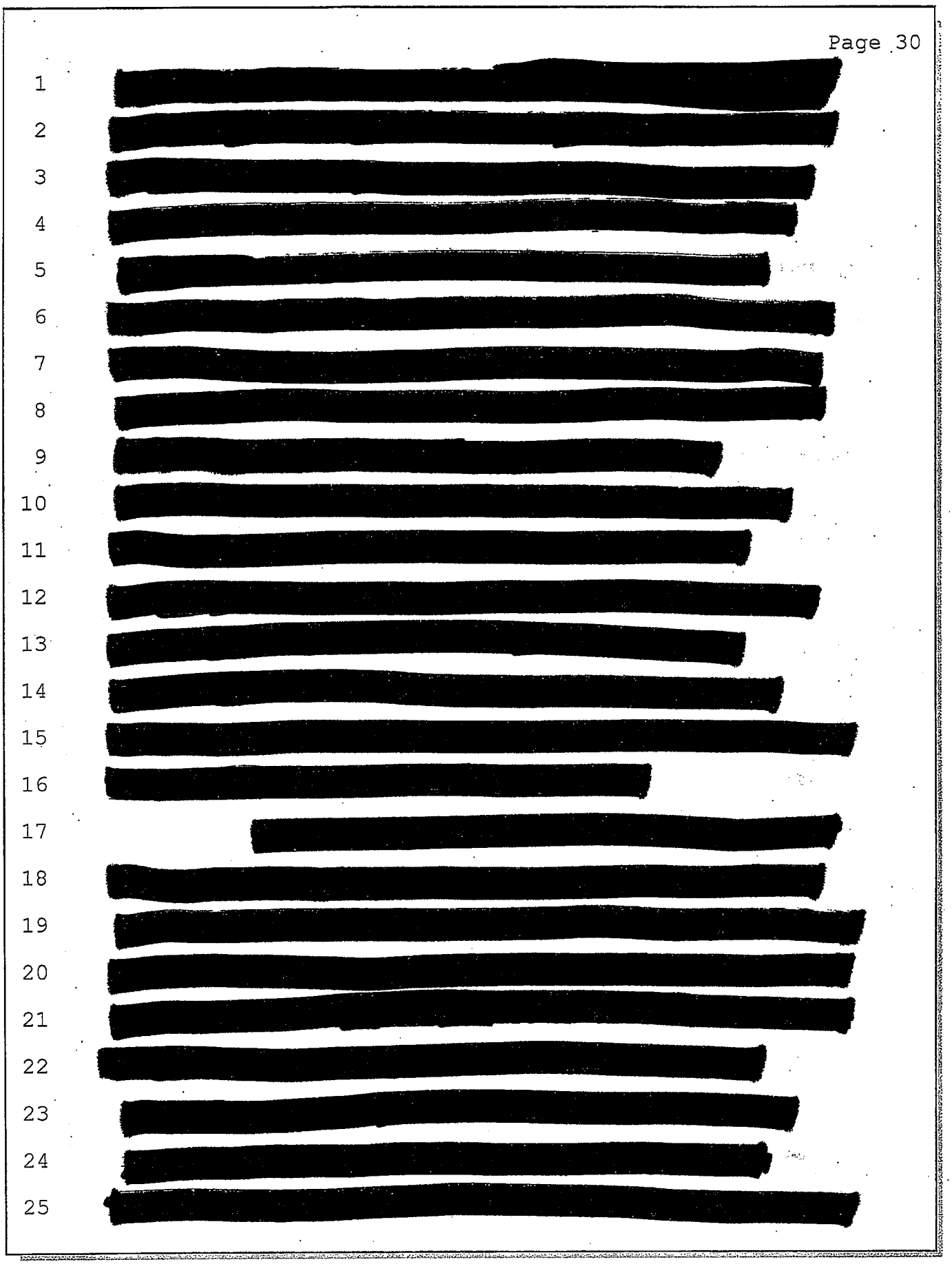
THE COURT: All right, thank you, for the record. We will admit Intervenor counsel and Plaintiff's counsel to the protective order. And again, we will issue an order after the hearing confirming that.

All right. Well, thank you. And go right ahead, sir, Mr. Metzger?

MR. METZGER: There are a number of discrete elements of significant and irreparable harm that my client would suffer if the override remains in place and is not stayed. The chairman of Planetspace, Dr. Kathuria, has provided a declaration to the Court, which is attached as Exhibit B to our memorandum in support of application for a TRO, and it identifies six distinct areas where Planetspace will be injured if NASA begins on the performance of SpaceX and Orbital Sciences on this disputed contract.

[redacted]





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THE COURT: Well, I must say some of those reasons sound rather speculative and are rather contrary to what NASA I believe has sworn here, someone from NASA. I don't know whether it's an affidavit, but in any event, normally we assume that government employees, like everyone else, act in good faith here. I would not want to just assume on the basis of speculation that they're trying to mislead the Court over there at NASA.

But it seems to me if we stick to the issues that are mentioned in the statute, best interest of the United States, now I agree with what I think you were saying earlier, at least certainly the implication of your comments were that that standard is such that the agencies would always win if all they have to do is say it's in our best interest and leave it at that. I see that problem. And the fact is apparently judges here have vacated stays or rather reinserted stays. So apparently it's not impossible to do. And the urgent and compelling circumstances, that's the far more important one I think.

It seems to me, and I was a little bit facetious there at the beginning talking about that Supreme Court decision. But it seems to me that

facially at least, in most of these cases, we have to go along with what the agency swears to us, that these circumstances are in fact urgent and compelling. We can look at the circumstances they say are urgent and compelling and decide whether they strike us as urgent and compelling I suppose.

But you see the problem here I guess, Mr. Metzger, for a Court not having a record but merely representations by the United States. Some of the reasons that you've just argued strike me as being speculative. You're worried about things that might happen, in other words. I don't know why the United States, for example, would be particularly interested in support a particular contractor for this job to the extent that you would buy. I don't believe that either, but it doesn't strike me as being a conclusion I would lead to.

But, in any event, I will give you another shot at it, if you want, once we hear from the others. If that's all right with you, I'll move on to the United States, I guess. Mr. Rayel, would you like to

MR. RAYEL: Mr. Mager will

THE COURT: I'm sorry, go right ahead, sir.

MR. MAGER: Thank you, Your Honor. Your

Honor, if it pleases the Court, at the outset, I would like to focus again upon the standard for granting injunctive relief and what a plaintiff needs to show, because I do think that counsel for Planetspace is straying somewhat from that. I don't know if he's argued that the Court should grant the TRO. I simply said that the Court can review the record and determine if Planetspace's allegations have any merit. Respectfully, that's not the standard which is employed for granting a TRO. A TRO requires that Planetspace be able to affirmatively demonstrate a likelihood of success on the merits, irreparable harm, that the stay would be in the public interest, and the balancing of those harms.

THE COURT: You're viewing this as a TRO case?

MR. MAGER: Well, they filed a motion for a TRO and a preliminary injunction.

THE COURT: Oh, I see.

MR. MAGER: The standards for a TRO and a preliminary injunction are actually quite similar. But, consistent with PGBA, the government's position is RF cases involving injunctive relief, ultimately, you are seeking to stop the government from performing. And a couple of statements by

Planetspace's counsel are a little bit confusing. The contracts in this case have been awarded. They were awarded in December. He's correct that a CICA stay was put in place; but after notification to GAO, that CIA stay is dissolved when the agency submits its determinations and findings to the agency. So, currently, there is no CICA stay in place. He's argued some of the relief as though nothing has been happening, whereas things have been happening since well, since about eight days before they filed with this Court, which was about the time the CICA stay would have been dissolved.

THE COURT: I'm sorry, say that again. After the the CICA stay dissolves automatically, doesn't it?

MR. MAGER: There is an automatic CICA stay. That automatic CICA stay, by statute Congress provided, can be overridden by an agency when they show, in the case of a post-award decision, as this is, either urgent and compelling circumstances or best interest to the United States. In this case, the agency did issue its determinations and that CICA stay is no longer in place and the agency has proceeded with or is proceeding currently with the contract at issue.

Now, this Court then the case law provides that this Court, then, may review the agency's override of the CICA stay; but the agency, at this point, has already overridden the CICA stay. Congress basically while it provided an automatic device to suspend agency action, it also provided, expressly by statute, an override mechanism for agencies, who find themselves in urgent and compelling circumstances.

Obviously, pursuant to Ramcor, this Court can review the agency's determination to override a CICA stay and pursuant to Ramcor and Federal Circuit precedent, that standard is arbitrary and capricious, as this Court stated at the outset. Reilly's Wholesale does not and cannot change the standard of review for this Court, nor does it purport to. Some statements by counsel for Planetspace seem to imply that a new standard has been put in place. But, ultimately, that standard remains arbitrary and capricious.

Further, it's worth noting that counsel for the Plaintiff is incorrect to the extent he states that this Court has consistently and always followed the Reilly's Wholesale factors since they have been issued by this Court. While I do not have the full review of the case law acknowledged, Your Honor, I do

know Management Solutions, a 2007 case by this Court, did not use the Reilly factors in assessing, but generally determined that focused upon whether the agency's decision lacked a rationale basis or violated procurement regulation or procedure consistent with the APA standards.

THE COURT: But, I thought didn't you say something about the CICA stay dissolves?

MR. MAGER: Yes. The CICA stay can be overridden when the agency issues its determination and findings and then provides notice to the GAO that it has issued its determinations and findings. I believe

THE COURT: I do notice that and the CICA stay is not in effect because of the override.

MR. MAGER: The CICA stay is not in effect because of the override.

THE COURT: Right.

MR. MAGER: That's why we're here.

THE COURT: Okay.

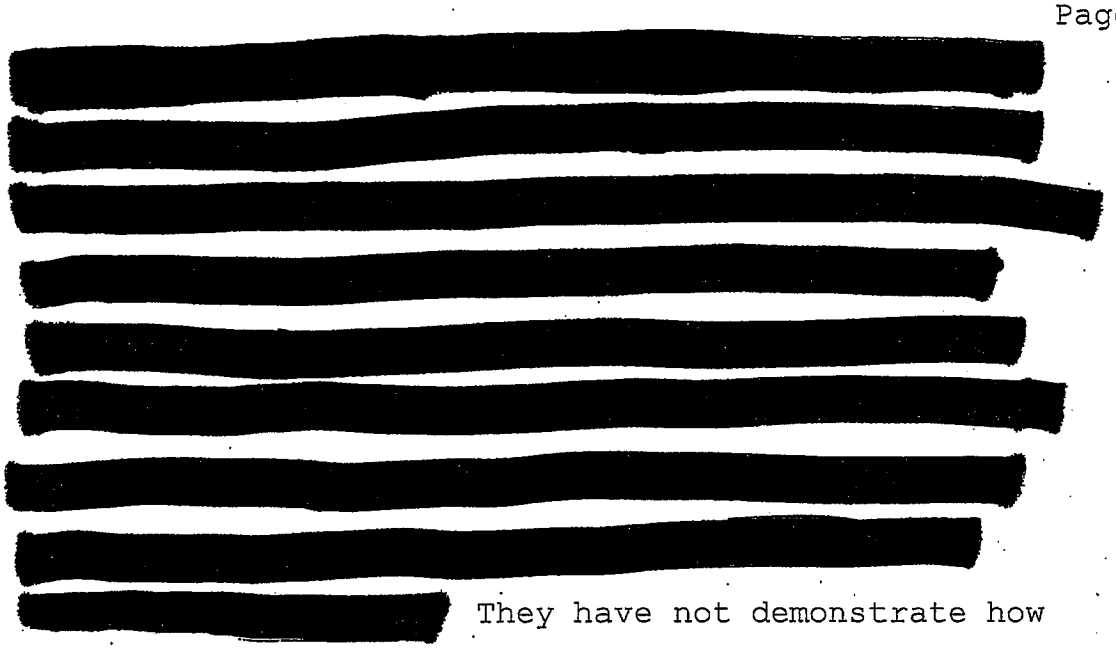
MR. MAGER: That's why we're in Court. But, there were some statements by counsel that I wanted to clarify, because when he was talking about the granting of injunctive relief and the standards for an injunction, at times, he referenced the fact that he

referenced that would really be made or that, you know, a stay when the stay will be lifted and the fact is the stay has been lifted and an award has been made in this case. Award was actually made in December.

In any event, addressing some more specific allegations raised by the Plaintiff in this case. They claim that their client would be irreparably harmed. Correctly, I believe that these harms are all described as speculative. [redacted]

They, also, of course, assert that the agency is acting in bad faith. As this Court is well aware, the standard for demonstrating bad faith is clear and convincing evidence and they come nowhere near to meeting that in their declaration, especially by simply alleging that they believe that the agency is going to be and is acting in bad faith.

[redacted]



They have not demonstrate how this would harm them, especially since the agency's determinations has affirmed its commitment to abide by GAO's decision, even to the extent that requires a re-competition. And it's worth noting that NASA has and there is now showing NASA has ever not abided by a decision by GAO. Such a finding would be hard to make since in the last 10 years, there are only five instances in which an agency has taken exception to GAO's recommendations.

In any event, it's also worth noting that the Supreme Court stated in eBay v. Merc Exchange, a 2006 case, a Federal Circuit decision regarding the Copyright Act, that it is improper for a court to provide injunctive relief of presumed harm on the basis of, in that case, potential loss of market share, because in that situation, the Supreme Court

a scenario, in which injunctions always arise, much like here, where to the extent that your competitor sees a benefit, that circumstance will always arise when the agency is proceeding with the contract.

Turning to success on the merits, engaging the Claimant's presumption that this Court should be looking at the Reilly factors, as Plaintiffs have called them, even using those factors, the Plaintiffs fail to demonstrate that they would be entitled to relief. The agency's determinations are based on concrete realities that are acknowledged by the Plaintiff, in their own filings. Plaintiffs acknowledge that there is risk within the schedule and they acknowledge expressly that this is an aggressive schedule. Much of their finding focuses upon that fact, a reality which confronted NASA.

It's also a reality that by presidential policy, the space shuttle is to be phased out by 2010. That's a matter of presidential policy and contrary to what they assert in their pleadings, not a matter of simply NASA policy or NASA decision to phase out the space shuttle in 2010. In their memorandum, they mention there's a white paper by candidate well, at the time candidate Obama, now President Obama, that talked about the possibility of extending the space

shuttle's mission. But, to date, there is no presidential policy that extends the space shuttle's mission and this would require NASA to react on speculation that now President Obama will do what he stated a potential intention to do when he was on the campaign trail. I don't like to say that it's arbitrary and capricious to rely upon pledges made on a campaign trail, but when there's a specific presidential policy in effect, the agency is required to follow that policy. It is not arbitrary and capricious to follow a policy, which has been set forth by the President.

Neither would it be arbitrary and capricious for this Court to follow Supreme Court precedent. For example, if on the Supreme Court five new justices were appointed tomorrow and those five justices in law review articles had speculated that they believe Johnson Gravel was wrongly decided and this Court's six-year statute of limitations is not jurisdictional. The simple appointment of those five new justices to the Supreme Court would not mean that this Court could ignore the binding precedent that exists from the Supreme Court.

Plaintiffs cite to several cases in their brief, but they fail to note the critical distinction

between the cases they cite and this case, which is those cases, such as Reilly's, such as e-Management all involve a case where there was an incumbent contractor rather than a new contract, which was going into effect. In those circumstances, the court held in many instances that it would be arbitrary and capricious for the agency to decide to proceed forward with an override, when it had a contractor in place, who was ready, willing, and able to perform that contract. We contrast the situation with a situation that occurred in Alion, where the agency was moving forward with new contract requirements and the court held that there was no incumbent and it was not arbitrary and capricious for the agency to override the stay in that instance.

In their briefs, Planetspace raises a number of other arguments based upon speculation. They talk about how the agency might have been able to enter into Russian agreements or might be able to enter into Russian agreement. Again, that's speculation at this point. And as the determination, itself, demonstrates those agreements the agency looked at, looked at the possibility of using Russian spacecraft for this mission and ultimately determined that the length of time to acquire those services would be lengthier than

proceeding forward with these contracts or indeed proceeding forward with even Planetspace's contract. There is nothing that they present that indicate that Russia is a viable option. And interestingly enough, these assertions with regards to the reliability of turning to Russia contradict a number of the assertions that they have made in their filings at GAO with regards to the reliability of Russia in speaking of their competitors' proposals.

In any event, most of their memorandum focuses upon policy disagreements and NASA's various considerations in determining to focus upon commercial space flight services. In some senses, they're seeking to burn down the house that they want to live in. But in any event, policy disagreements do not have a place in this Court.

In any event, it's also worth noting that the policy disagreements that they state and the statements that they reference from other actors in the government or from NASA are statements that often predate the maturity of the CRS program at issue here. The proposals or NASA only received the proposals in this case the bulk of those was in June 30, 2008 with regards to a full schedule and a number of the statements which they reference are from 2007, earlier

in 2007, and before even RFI responses had been fully compiled and all of the relevant responses had been compiled.

Turning to the other Reilly factors, it is clear the agency did look at the cost benefit ratio. We will acknowledge, of course, that there is a cost and the determination does acknowledge that there is a financial cost to the agency should GAO determine that a re-compete will be necessary. Put in context of the entire program, the cost makes a lot more sense. You have, depending upon how you account for it, a $35 to $100 billion space station, a $3.5 billion contract, an expenditure of $10 million. While $10 million is nothing that the agency takes lightly, putting proper perspective, it is only a portion of the cost, is the cost necessary to get production moving.

Further, with regards to the impact on competition, the fourth Reilly factor, as we noted previously, the agency has said that it would abide by GAO's determinations. The agency's determinations itself show respect to the Reilly factors and for the need to consider the effect on competition. The agency carefully analyzed all of the factors in making its determination.

There are two other prongs worth noting with

regards to the temporary restraining order or to the grant of any injunctive relief. One is the public interest and the other is generally a balancing of the harms. In this case, the risk that exists is that NASA will not be able to independently reach a space station that it spent 25 years building. The public has an interest in a robust space program and the development, use and encouragement of commercial space flight.

Moreover, while they spent a portion of their brief talking about NASA possibly turning to and funding a Russian development, the Plaintiffs fail to explain how it would ever be in the public interest for the United States to be developing Russian rocket capacity as opposed to American private commercial enterprise.

At the end of the day, in balancing the harms, the agency has listed specific concrete harms to the agency. Planetspace has listed speculative harms, that they may suffer. They also do not demonstrate that these harms, in the event we are talking about a TRO, would be incurred over the course of 10 days, over 10 days in any specific instance that they would suffer any specific harms. For these reasons, we respectfully request that the Court deny

Planetspace's motion for a TRO and preliminary injunction.

THE COURT: All right, thank you very much.

MR. MAGER: Thank you, Your Honor.

THE COURT: Let's see, the Intervenors, would you like to say a few words?

MS. TENNEY: Thank you, very much, Your Honor. Orbital agrees with all of the points that the government has made and we won't repeat all of the arguments that the government has made here. But, I did want to talk for a moment about that third factor that Mr. Mager addressed about the balancing of the harms. Under the Reilly's opinion, intervenors are also the harms to intervenors may also be addressed. And in this specific situation, given the urgency of NASA's need to get to the space station after the space shuttle is retired, Orbital will certainly be harmed if Orbital is not able to actually go forward right now, in terms of acting on the contract.

The schedule that Orbital proposed is extremely aggressive. Basically, at this point, what we're dealing with is every day that the contract might be delayed may result in at least one additional day of delay and because of the urgency of getting to the space station, we need to make sure that no

further delay occurs. For that reason, we would respectfully join the government's arguments and ask for the preliminary injunction and the TRO motion to be denied.

THE COURT: Okay. Thank you, very much.

MS. TENNEY: Thank you, Your Honor.

THE COURT: Mr. Vacura?

MR. VACURA: Thank you, Your Honor. SpaceX will also be brief and not surprisingly, we agree with the government and the view articulated by Mr. Mager. I would also, though, like to just focus on a couple of the allegations in the briefs about harm to SpaceX that I think the Court should also be aware of, because some of the statements that are made in the memorandum just are not correct. They're factually incorrect. In particular, Planetspace argues, without citing to any facts in the record, that there won't be any adverse impact due to the delay that would be caused by the stay, because SpaceX and Orbital are being funded through another NASA program called COTS. And they also allege that there is substantial overlap between COTS and the contract at issue here, CRS. It is simply wrong and the Plaintiff provides no factual proof for it, in its argument.

Under the COTS program, which is the

Commercial Orbital Transportation Services demonstration program, SpaceX is performing work for NASA in developing demonstration launch vehicles. But, there is neither overlap nor do they directly support the CRS planning and other CRS related activities that would otherwise be scheduled to occur during the pendency of the GAO protest. It just simply isn't true.

As counsel for Orbital said, the schedules in this case for performing to the first launch are extremely aggressive. SpaceX's first launch required by the contract is in December 2010. And the activities that SpaceX must engage in during the period until a GAO protest is decided are extremely critical to meeting that compressed schedule and to having a successful launch in December 2010. In particular, there are activities that if SpaceX is stayed from performance and cannot perform until the GAO protest is decided in April will have a dramatic impact on their ability to meet the schedule. And some examples of these are set out in the D&F that NASA fully considered before determining to override the stay and they include activities such as purchasing long lead items that just simply take time to manufacture and are extremely difficult to

accelerate. So unless that activity is underway, the schedule truly is jeopardized in December of 2010.

There is also studies, planning, and other design work that needs to occur during this period that is also very critical. And, again, the allegations that Planetspace makes, that this is activity that is already occurring under the other contract, the COTS program, is simply incorrect. The primary difference between COTS and the CRS program here is that the CRS program requires carrying cargo to the international space station and back and that is very different from anything that's being done under the COTS program, which, as I said, is a demonstration program for the launch vehicle, itself.

One other point I would make, Your Honor, is that as far as the primary argument that Plaintiff makes, in terms of trying to claim that there would not be adverse impact from continuing with the stay and all of these various alternatives that they say NASA failed to consider, one, that's wrong. NASA actually lists in the D&F other alternatives that they considered, such as extending the shuttle, such as obtaining launch services from Russia and so forth. It's all laid out in detail in the D&F. NASA obviously considered it.

But the other aspect of that, that is important for the Court to focus on, is those other alternatives just aren't reasonable and that's really what the law requires. Even if you accept the Reilly factors and other cases that have used the Reilly factors, fundamental to the Reilly factors are that other alternatives have to be reasonable and the cases cited by government counsel reflect that. In cases that were the stay was overturned, there were incumbent contractors in place, so they were readily available alternatives that were reasonable and the government failed to consider them. In cases that counsel cited where the stay has not been overturned, it's the alternatives that were available just were not reasonable. And here what Plaintiff would have the Court do is accept the fact that NASA should have entered into international agreements with Russia, should have taken actions contrary to presidential policy regarding the shuttle, and a host of others, which are just speculative.

In the end, Your Honor, the facts that were considered by NASA that are laid out in detail in the D&F show deliberate, thoughtful, considerate action by the agency and should not be overturned. We respectfully request that the Court deny the TRO.

Thank you, Your Honor.

THE COURT: Thank you, sir. Anything else, Mr. Metzger? Mr. Metzger?

MR. METZGER: I'm sorry. Thank you, Your Honor. I would like to offer just a couple of comments.

THE COURT: All right, sir.

MR. METZGER: First, I want to make it clear that at no time has Planetspace asserted bad faith. We have raised a challenge to the agency's action by comparing statements of agency personnel in 2006 and 2007 and 2008 to the very different statements that are made now. I think that's a fair question, at least meant to impugn the integrity of NASA.

But the issue before the Court is whether NASA has made a sufficient justification to warrant extraordinary action and that is to reject the ordinary position of the stay and to let the GAO proceed through is course. That is what Congress expected of NASA a month after our GAO protest was filed. They had already decided that it couldn't wait the remaining 74 days and come up with a very dramatic statement of there would be horribles and harms that would be caused if these two companies are not permitted to proceed.

Our view is that we are entitled to a TRO, because, first, I think we have established the probability of success on the merits. We have raised various arguments, not rebutted by NASA or Intervenors in this argument, as to whether there is any necessary adverse outcome that would occur with the stay that's already installed.

On the question of the four factors, certainly, we have shown that our client believes that it will suffer serious injury. The ultimate risk to our client is that it will not be able to receive corrective action from the GAO that would include award of the contract and the loss of a contract of a billion-and-a-half dollars or more at least to me is a very serious injury, one that would be easily qualified as irreparable.

There also is a public interest consideration that ought to be respected and that is that Congress has decided how protest processes do proceed at the GAO and a stay is issued in the ordinary course and only in the extraordinary course should it be lifted and we don't believe that NASA has made a sufficient determination.

I do want to mention a point that came up in the government's comment and that was that NASA

considered many alternatives. Well, I agree, NASA did consider many alternatives and they have been actively considering those alternatives for years, because, simply put, there is no reason to rely upon the ability of either SpaceX or Orbital to actually perform the CRS missions on the schedules that are indicated by that contract. And I'm not saying that in my own opinion, but that NASA has acknowledged that in its determination and repeatedly in public statements and testimony. It is a very challenging thing for companies to create whole new launch systems from scratch and for the first time to fly orbital vehicles and to do so in proximity to a manned space vehicle and to do all of that in a period of just several years. For that reason, these two companies have received nearly $500 million worth of contracts from NASA to develop those vehicles and they have a very long way to go before they have even successfully tested the rockets or orbital vehicles, much less qualify them to fly to the space stations.

From that sense, it borders on the incredible, Your Honor, for NASA to ask this Court to believe that if we don't add 74 days to the schedule of Orbital Sciences and SpaceX, somehow NASA will have no choice other than to abandon the space station. It

truly is hyperbole. But, it's not on the part of the protestor or here the Plaintiff; it's on the part of NASA. It overstates the problem and it under-recognizes what, in fact, are its alternatives. NASA has known and has planned for years this eventuality that one or any of these CRS suppliers may not be able to supply the space station as quickly as NASA hopes.

Finally, there was this question that Mr. Vacura made as to what was being done on one contract as opposed to another. And I accept the clarification that there is a difference in the work that was being performed under this CRS contract, on the one hand, and the work that's being paid for by NASA under the preexisting COTS contract, on the other. However, it is really important to appreciate that in February and March alone, Orbital Sciences will receive $60 million under that COTS contract on development of a launch vehicle that it will use for this new CRS contract. And I believe in March, SpaceX will receive $15 million under the COTS contract. But let's step back one step further, if you please, and discern what those monies are for. Those monies, which will eventually come to nearly $500 million, are monies that are being paid by the government for each SpaceX and Orbital to show that they actually can perform

this mission, which is the subject of CRS. In fact, if they suffer any delay or any problems or any technical glitches, they are not going to be able to meet the schedule under CRS because they will not have a launch vehicle that is capable and qualified. So, it is a bit misleading to suggest that accelerated performance on CRS would come out independent of what is being done under COTS, because COTS is trying to develop the hardware and if the hardware isn't finished or doesn't work, then there's nothing to use to perform CRS.

Finally, I would like to again ask the Court to consider the state of the record and where we are. Obviously, this is a serious matter. Obviously, there are very capable counsel involved. Obviously, the agency went to considerable effort, at least, to prepare the determination and findings for the override. But today, as the Court said at the outset, the only papers in front of the Court are the override determination, itself, and the moving papers and supporting materials from Planetspace. What the Court does not have is the agency record. And as the Court knows very well, of course, an APA decision is on not a particular agency document, not a particular determination, but it is on the record that supports a

particular agency action that is contested. Our proposition today really is a simple one. We think the Court should take the time and get the record and allow the record to be briefed and then in a matter of just a week or two make a decision on a preliminary injunction, and in order to preserve the status quo and give the Court the fullest opportunity to make that decision without being prejudiced by money that NASA is spending everyday, we think that a temporary restraining order is prudent and justified. Thank you.

THE COURT: Thank you, Mr. Metzger, and thank you for getting up at what must be a difficult hour to join us today. If I had realized, somehow I missed the fact that you were on the west coast, we could have set it a little bit later.

I am a little troubled I suppose by the delay. I don't know whether that is common in these cases, but it strikes me that 26 days or whatever it was, if it's that immediate and crucial that there could have been some action before then.

MR. MAGER: Your Honor?

THE COURT: Yes.

MR. MAGER: This is Steve Mager from the United States. If you wish, I could actually address

that.

THE COURT: Well, that's all right. I was going to say, though, that it's merely an issue that strikes me, and I assume there is an explanation, but I'm not sure that it has a legal effect anyway. But given that particularly, I can't ignore the fact that this agency with expertise in the field represents to the Court that, as the statute provides, that the best interest of the United States are involved and that urgent and compelling circumstances apply.

I assume they acted in good faith, had no reason to think that they did not in this case. And I haven't really heard anything other than speculation or issues that go to the merits that persuade me that I should get involved in this. I don't view it as an injunction case, as injunctive relief. It may have the same effect, the standards are different, but it may be that the effect is the same. But, I view it as merely a review of an agency decision that's not entirely substantive in the sense of a typical APA case.

And while it's true, as Mr. Metzger pointed out, that Congress provided for this automatic stay, it also provided for this override process and the override process seems to have worked. It seems ready

on its face and I don't feel that this Court should get involved at this stage and I still do. I deny that motion and I will issue an order confirming the petition, I guess it was, in the form of an injunction I will issue an order confirming that ruling when you get back and also the issues that you mentioned earlier about the protective orders.

If anyone has any questions, I would be glad to entertain those.

MR. METZGER: Your Honor, if I may ask one question.

THE COURT: Certainly. Yes, sir?

MR. METZGER: Will you issue both as to the application for the TRO, as well as the preliminary injunction?

THE COURT: Yes, yes, and I will make that clear. Frankly, I don't have the exact one of the motion or the petition, but I will make that clear in the order.

MR. METZGER: If I may ask one further question.

THE COURT: Yes.

MR. METZGER: We have also sought declaratory relief and for purposes of declaratory relief, the factors that are relevant to a TRO and

preliminary injunction are not required. Does your order extend also to declaratory relief?

THE COURT: Yes. I think, in fact, that's what I meant to convey, that I view this as more of a declaratory action. But, in any event, the effect is the same, I suppose. If there are technical differences that we need to worry with, we'll deal with those in the order, as well. In other words, if it makes a difference exactly what it is that I'm denying and what the form is, then we'll be sure to cover all of that, and I am sure you'll let me know if we don't. But, I will try to resolve that as quickly as I can. I'm aware, of course I mean, I'm letting you know of the ruling now, because I know that time is of the essence here and I want you to have time to plan, from all of your standpoints.

Thank you very much for joining us, and I imagine we will be back in touch.

(Whereupon, at 11:42 a.m., the hearing in the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: 09-99C

CASE TITLE: Planetspace, Inc. v. United States

HEARING DATE: February 20, 2009

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Court of Federal Claims.

Date: February 20, 2009

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Christina Chesley

Heritage Reporting

Corporation

1220 L Street, N.W.

Washington, D.C. 20005